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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/734,803	12/12/2000	Maurice Raymond Hickling	20526/111695	5200

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Mark E. Waddell, Esq.
Bryan Cave LLP
245 Park Avenue
New York, NY 10167-0034

EXAMINER

GOLLAMUDI, SHARMILA S

ART UNIT	PAPER NUMBER
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1616

DATE MAILED: 05/29/2003 //

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application N .

09/734,803

Applicant(s)

HICKLING, MAURICE RAYMOND

Examiner

Sharmila S. Gollamudi

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 11 March 2003.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-12 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-12 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on _____ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892) 4) ☐ Interview Summary (PTO-413) Paper No(s). _____
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948) 5) ☐ Notice of Informal Patent Application (PTO-152)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) _____ 6) ☐ Other:

DETAILED ACTION

Receipt of Request for Continued Examination received on March 11, 2003 is acknowledged. Claims 1-12 are included in the prosecution of this application.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1, 3-6, and 12 are rejected under 35 U.S.C. 102(b) as being anticipated by Ribier et al (5,756,108).

Ribier et al disclose a cosmetic or dermatological composition containing an aqueous phase and an oily phase dispersed within. The reference teaches that although emulsions are easy to apply and impart good sensory properties, emulsion lack stability causing phase separation. Although this phase separation is prevented by the use of surfactant, excessive amounts of surfactants causes skin irritations. Ribier teaches that the use of phytantriol cubic particles provides stability and less irritation since the cubic gel particles requires less surfactant. See column 1, lines 5-40. The composition contains 0.1-15% of a component such as phytantriol and 0.05-3% of a dispersing agent. Polysorbate 20 is taught as a dispersing agent. See column 3, lines 59. Ribier et al teach natural dyes, oxidation couplers and bases (permanent dyes), direct dyes (semi-permanent dyes), and auto-oxidizable dyes. See column 7, lines 14-15. Ribier et al disclose the process of mixing the phytantriol in a dispersing agent and

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an active ingredient. Further, the reference discloses the application of the composition on the area that is to be treated.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

Claims 1, 3-6, and 12 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ribier et al (5,756,108).

Ribier et al disclose a cosmetic or dermatological composition containing an aqueous phase and an oily phase dispersed within. The reference teaches that although emulsions are easy to apply and impart good sensory properties, emulsion lack stability causing phase separation. Although this phase separation is prevented by the use of surfactant, excessive amounts of surfactants causes skin irritations. Ribier teaches that the use of phytantriol cubic particles provides stability and less irritation since the cubic gel particles requires less surfactant. See column 1, lines 5-40. The

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composition contains 0.1-15% of a component such as phytantriol and 0.05-3% of a dispersing agent. Polysorbate 20 is taught as a dispersing agent. See column 3, lines 59. Ribier et al teach natural dyes, oxidation couplers and bases (permanent dyes), direct dyes (semi-permanent dyes), and auto-oxidizable dyes. See column 7, lines 14-15. Ribier et al disclose the process of mixing the phytantriol in a dispersing agent and an active ingredient. Further, the reference discloses the application of the composition on the area that is to be treated.

Assuming that Ribier et al do not anticipate the instant claims since they are not exemplified, it is deemed obvious to one of ordinary skill in the art at the time the invention was made to include hair dyes into the phytantriol and dispersing agent with the guidance of Ribier et al. One would be motivated to do with the expectation of similar results since Ribier suggests the inclusion of hair dyes into the cosmetic composition.

Response to Arguments

Applicant argues that Ribier et al do not teach a composition wherein the phytantriol is dissolved in a dispersing agent and hair dye. It is argued that the dissolution of phytantriol in water and dispersing agent as claimed produces an aqueous medium that is physically different from Ribier et al. It is noted that Ribier et al disclose that the cubic particles are based on phytantriol, water, and one surface active agent which has a fatty acid chain; however applicant argues that although the claimed composition has phytantriol, water, and dispersing agent, it cannot form the cubic particles.

Applicant's arguments have been fully considered but they are not persuasive. The examiner points out that that Ribier teaches mixing phytantriol and water, which is then mixed with a dispersing agent. The dispersing agent is a polysorbate surfactant. Note example 1. Therefore, the claims are not patentably distinguishable from the prior art since the phytantriol and dispersing agent are taught in the same amount and the claims do not exclude a cubic particle. Although applicant argues that the instant composition cannot form such a form, applicant recites a composition with same components as the prior art without a distinguishing factor.

Claims 2 and 6-7 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ribier et al (5,756,108) in view of Saphakkul (4,964,874).

As set forth above, Ribier et al disclose a cosmetic or dermatological composition containing an aqueous phase and an oily phase dispersed within. See column 1, lines 5-40. The composition contains 0.1-15% of a component such as phytantriol and 0.05-3% of a dispersing agent. Polysorbate 20 is taught as a dispersing agent. Ribier et al teach natural dyes, oxidation couplers and bases (permanent dyes), direct dyes (semi-permanent dyes), and auto-oxidizable dyes. See column 7, lines 14-15.

Ribier et al do not specify the type of direct dye that can be used or the amount.

Saphakkul teaches a hair treatment product. The reference teaches utilizes direct dyes such as anthraquinones for the coloring the hair. The color uptake by the hair is rapid and achieves moderate darkening when these dyes are used. Column 1, lines 15-50. Several anthraquinone dyes imparting different colors and the amount used (.001-0.5%) are taught on column 3.

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It would have been obvious to one of ordinary skill in the art at the time the invention was made to combine the teachings Ribier et al and Saphakkul and includes and anthraquinone dye into Ribier's composition. One would be motivated to do so since Saphakkul discloses that anthraquinone dyes are direct dyes that impart semi-permanent color to the hair and are rapidly taken up by the hair. Furthermore, one would expect similar results since Ribier teaches the suitability of direct dyes into the composition.

Claims 9-11 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ribier et al (5,756,108) in view of Wenke et al (5,628,799).

As set forth above, Ribier et al disclose a cosmetic or dermatological composition containing an aqueous phase and an oily phase dispersed within. See column 1, lines 5-40. The composition contains 0.1-15% of a component such as phytantriol and 0.05-3% of a dispersing agent. Polysorbate 20 is taught as a dispersing agent. Ribier et al teach natural dyes, oxidation couplers and bases (permanent dyes), direct dyes (semi-permanent dyes), and auto-oxidizable dyes. See column 7, lines 14-15.

Although Ribier et al teach permanent hair dye as an active, Ribier et al do not teach a specific hair dye kit where the primary reactor (oxidizing agent) and secondary reactor (coupler) are in separate packs.

Wenke et al disclose a hair dye kit in which the oxidizing agent and a coupler are premeasured in different containers and mixed together by the user. See column 11 and 12 line 65 through 10. This premeasurement facilitates the correct use by the consumer; therefore no special expertise is required for the process. See column 3,

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lines 59-67. Furthermore, the kit allows for in-home use and is shelf-stable. See column 3, lines 60-67. Wenke et al disclose the instant amount of oxidizing agent and coupler. See column 13, lines 38-52. Wenke teaches that after applying the composition the color remained essentially unchanged after several cycles of shampooing. See example 66.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to combine the teachings of Ribier et al and Wenke et al and provide for a hair dye kit. One would be motivated to do so Wenke et al teach the advantages of using a kit to provide permanent hair color such as correct use by the consumer and in-home use. Furthermore, one would expect similar results since Ribier et al teach utilizing permanent dyes with an oxidizing and coupling agent. Lastly, one would be motivated to use the permanent hair dye of Wenke since Wenke teaches that the hair dyes provides color durability during repeated shampoos.

Response to Arguments

Applicant argues that the examiner has not provided any evidence that the permanent coloring composition disclosed by Wenke would benefit by being combined with a phytantriol delivery system.

Applicant's arguments have been fully considered but they are not persuasive. The examiner points out that Wenke is used as the secondary reference and does not have to teach the broad concept of the invention, i.e. the phytantriol delivery system, which is covered by the primary reference. Wenke is relied upon to teach the advantages of using a kit to color the hair. Furthermore, a skilled artisan can reasonably expect success since Ribier envisaged permanent and semi-permanent hair dyes. The

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separation of an oxidizing agent and coupling agent for hair coloring compositions is known in the art. The examiner provides art of interest, US patent 4,517,175, column 12, lines 19-24, to demonstrate that this is known in the hair composition field. Lastly, Wenke teaches that the dopa compounds used as the permanent hair dye provide do not fade after repeated shampooing (wash fastness), thus providing motivation to use the particular dyes of Wenke.

Claims 11 is rejected under 35 U.S.C. 103(a) as being unpatentable over Ribier et al (5,756,108) in view of Savaides et al (5,350,572) in further view of Krutak et al (5,951,718).

As set forth above, Ribier et al disclose a cosmetic or dermatological composition containing an aqueous phase and an oily phase dispersed within. See column 1, lines 5-40. The composition contains 0.1-15% of a component such as phytantriol and 0.05-3% of a dispersing agent. Polysorbate 20 is taught as a dispersing agent. Ribier et al teach natural dyes, oxidation couplers and bases (permanent dyes), direct dyes (semi-permanent dyes), and auto-oxidizable dyes. See column 7, lines 14-15.

Ribier et al does not teach color durability of the composition.

Savaides et al teach permanent waving compositions. The reference discloses that phytantriol is a penetrating agent. See column 5, lines 54-55.

Krutak et al teach a hair coloring composition. The reference discloses that customarily hair is colored using low molecular weight compounds, which penetrate the keratinous fibers. The reference states that it becomes very difficult even after repeated shampoo to remove color that has penetrated the hair fibers. Treatments that coat the

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hair and that do not penetrate the hair fibers can easily be removed. See column, 1 lines 42-58.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to look to the teachings of Savaides et al and Krutak et al and utilize Ribier's composition to increase color durability. One would be motivated to do so since Savaides teaches that phytantriol is a penetration enhancer and Krutak teaches that when the color molecule penetrates the hair fiber it cannot be washed out of the hair easily; therefore with the teaching of the prior art a skill artisan would ascertain that Ribier's composition would implicitly increase color durability since phytantriol is known as a penetration enhancing agent.

Art of Interest

The prior art, US patent 4,517,175 is cited as art of interest to demonstrate the state of the art at the time the invention was made.

Correspondence


Any inquiry concerning this communication or earlier communications from the examiner should be directed to Sharmila S. Gollamudi whose telephone number is (703) 305-2147. The examiner can normally be reached on M-F (7:30-4:30).

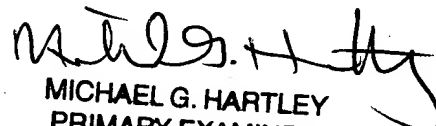
If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Jose Dees can be reached on (703) 308-4628. The fax phone numbers for the organization where this application or proceeding is assigned are (703) 305-3014 for regular communications and (703) 305-3014 for After Final communications.

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Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-0196.

SSG


May 23, 2003


MICHAEL G. HARTLEY
PRIMARY EXAMINER